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ABSTRACT

This booklet contains two papers on Western European countries' attempt to deal with illegal immigration through employer sanctions. In "Deterrence without Discrimination," Mark J. Miller discusses the sanctions employed by France and the Federal Republic of Germany (FRG). Evidence from the early years of enforcement reveals that due to poor interagency cooperation, insufficient enforcement personnel, and mild penalties, the sanctions appeared to have failed. However, in the early 1980s, when France and the FRG toughened their enforcement, the evidence indicates that job discrimination against North African Arabs did not increase, and Europeans now regard the sanctions as necessary to combat the exploitation of illegal immigrants. Malcolm R. Lovell, Jr. draws on Miller's analysis in "Europe's Lessons for America" and perceives the European experience as an important lesson for the United States. In the United States, the Department of Labor, the Social Security Administration, and the Internal Revenue Service need to play major roles in the enforcement of sanctions, while employer cooperation with these agencies is vital. The U.S. Immigration and Nationalization Service must be fully supported by Congress, and the re-evaluation of fines and penalties must occur on a regular basis. A conclusion of both papers is that employer sanctions are not a cure-all for the complex problem of illegal immigration in Europe or the United States. (DJC)

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CIS Paper

Employer Sanctions in Europe

Deterrence Without Discrimination
By Mark J. Miller

Europe's Lessons for America
By Malcolm R. Lovell, Jr.

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Employer Sanctions in Europe

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CIS Paper 3

About the Authors

Mark J. Miller is a Professor of Political Science at the University of Delaware. He has traveled and studied widely in Western Europe and has written extensively on European labor, migration, and nationality concerns. His study, "Deterrence Without Discrimination," is based on his 1985 assessment of employer sanctions in Europe for the German Marshall Fund of the United States. Miller is co-editor of the book, *The Unavoidable Issue: U.S. Immigration Policy in the 1980s*, published in 1983.

Malcolm R. Lovell, Jr. was Assistant Secretary of Labor for Manpower from 1970 to 1973 and Undersecretary of Labor from 1981 to 1983. His government posts include the National Advisory Council on Vocational Education and the National Commission on Manpower Policy. From 1973 to 1981, he was President of the Rubber Manufacturers Association. Formerly a Visiting Scholar of the Brookings Institution, he is now a Senior Research Fellow of the Hudson Institute. He also directs the Institute for Labor and Management of the George Washington University's School of Government and Business Administration. Lovell is the author of articles on industrial relations in Europe, immigration reform, and U.S. competitiveness.

4 EXECUTIVE SUMMARY

Faced with mounting illegal immigration, most major continental Western European countries adopted employer sanctions a decade ago. In their studies of the European experience, Mark J. Miller, a scholar on European migration, and former Undersecretary of Labor Malcolm R. Lovell, Jr., take differing perspectives: Miller documents the European record for making sanctions work without discrimination; Lovell examines the successes and failures of European enforcement for its lessons for U.S. policymakers as they prepare to implement employer sanctions in mid-1987. From their different vantage points, both observers conclude that Europe's experience shows sanctions can work and that it is relevant for the United States.

Reviewing the often misinterpreted European experience with sanctions, Miller finds that enforcement did in fact lag at the outset in France and the Federal Republic of Germany (FRG) because of poor interagency cooperation, insufficient enforcement personnel, mild penalties, and indifference among some public prosecutors and judges, leaving some outside observers to conclude that sanctions had failed.

But the French and Germans began toughening enforcement and penalties in the early 1980s, boosting fines and tightening coordination among enforcement agencies and police. France deployed more labor inspectors and set up new regional enforcement machinery. To counter poor public understanding and bureaucratic and judicial indifference, European governments publicized the abuses of illegal alien employment and reaffirmed enforcement priorities. They stressed exemplary action against notorious violators as an incentive for voluntary compliance and devised new tactics for employers who hid behind dummy fronts or subcontractors. With these measures, Miller finds, citations and fines rose sharply and voluntary compliance improved. In 1985 France, the FRG, four other European nations, and Hong Kong assured the U.S. General Accounting Office that sanctions were deterring illegal immigration.

Miller concludes that sanctions in France caused no increase in job

discrimination against persons of North African Arab origin, the ethnic group most analogous to U.S. Hispanics. Rather, most Europeans regard sanctions as necessary to combat the discrimination inherent in the exploitation of illegal aliens and to ease the integration of legal immigrants.

Building on Miller's analysis, Lovell finds valid lessons in both Europe's successes and failures. Lovell sees the United States as more endowed than Europe with a tradition of voluntary compliance among employers who, with proper leadership, will come to accept employer sanctions as a good business practice.

Other lessons Lovell draws from his assessment of Europe's performance are:

- The Department of Labor must play a critical enforcement role as its counterparts in Europe have. Success will demand that Labor increase significantly its wage and hour compliance staff and involve in the effort other Department of Labor activities that are in close touch with the workplace.

- Diverse government agencies dealing with social welfare, taxes, labor, agriculture, and law enforcement have been brought into Europe's enforcement effort. Similarly, the United States must tap the information and enforcement potential of such agencies as Social Security and Internal Revenue, as well as state and local labor standards and law enforcement agencies.

- The European experience with employers confirms the obvious: their cooperation is vital. Their interest in clear and unburdensome identification and paperwork procedures and in consistency of enforcement must be respected. Uneven enforcement among regions or industries could distort business competition and alienate employers.

- The European experience also reaffirms what has long been clear to the Immigration and Naturalization Service (INS): it must make best use of scarce personnel by concentrating on notorious viola-

tors, choosing its initial cases with care to avoid early, precedent-setting defeats.

- INS must have the full additional funding and personnel directed by Congress, now and in the future, with more of the cost of enforcement recovered through more realistic fees for services or through steeper fines and forfeitures.

- There must be sustained, high level support for the effort in Congress and the executive branch, particularly as enforcement successes begin to pinch special interests reliant on illegal foreign labor.

- Fines and penalties must have regular reevaluations to see that they are not too mild to deter, as they were initially in Europe.

- Some European employers showed remarkable adaptiveness in hiding behind subcontracting or dummy fronts. Another likely tactic for some employers is to shift the costs of possible penalties to their illegal alien workers. Such abuses must be countered by special vigilance, exemplary penalties, cooperation where possible with labor organizations, and the broadest possible interpretation of the new law's prohibitions against these practices.

- Reliable and secure identification is a major enforcement advantage for the Europeans, who have shown that it is not inconsistent with democratic values. For the United States, secure identification would be the single most important step toward effective enforcement, while relieving employers of the burdens of demoralizing uncertainties, threats of discrimination charges, and heavy paperwork.

Lovell finds that the prospect of heavy legal immigration and amnesty for up to 3.9 million more migrants over the next ten years lends special immediacy to Europe's emphasis on employer sanctions as enlightened labor legislation essential to integrating aliens and protecting them from exploitation.

Lovell joins Miller in finding that neither in Europe nor in the United States are employer sanctions a cure-all for the complex problem of illegal immigration: they must be used with other coordinated manpower, economic, foreign trade, and law enforcement policies. For Lovell, high among those policies are more efficient use of the U.S. labor force and the end of protection and labor subsidies for inefficient industries dependent on cheap foreign labor. He concludes that employer sanctions, rather than a burden, can support the U.S. quest for competitiveness by stimulating employers to optimize their use of labor and capital in their investment choices.

DETERRENCE WITHOUT DISCRIMINATION

By
Mark J. Miller

– Introduction: Confusion About Europe's Experience
– The French Experience: Stronger Enforcement Since 1982
– Initial Obstacles to Enforcement
– Initial German Enforcement Problems
– Stricter French and German Laws
– In France, an "Encouraging Balance Sheet"
– Western Europe's Commitment to Enforcement
– Publicizing the Costs of Illegal Immigration
– Employer Tactics for Evasion
– Employer Sanctions and Discrimination
– Implications for the United States

10 Introduction: Confusion About Europe's Experience

"Employer sanctions have proven to be ineffective deterrents to illegal immigration in at least twenty nations, according to the U.S. General Accounting Office (GAO)," reported the May 30, 1985 *Wall Street Journal*.[1] Reports such as this have fueled opposition to adoption of employer sanctions in the United States, even though a follow-up GAO evaluation in 1985, noting that its 1982 conclusions had been misinterpreted, found that officials in seven of nine countries surveyed believed illegal immigration would be worse without sanctions.

The wisdom of imposing employer sanctions was hotly debated in the United States during the decade and a half that Congress considered the immigration reforms finally enacted in October 1986. This situation contrasts sharply with continental Europe where employer sanctions were adopted with little or no public debate and a broad consensus in favor of the concept exists. In the United States, critics have warned that employer sanctions would lead to additional employment discrimination against Hispanics. Fear of employer sanctions possibly leading to additional discrimination against immigrants and minorities was a factor in the British decision not to adopt them. And there have been concerns expressed in other European countries with significant minority populations comparable to Hispanics in the United States. In the single most illuminating case, however, employer sanctions in France do not appear to have resulted in additional discrimination against the French citizenry and legally-resident alien population of North African background.

In marked contrast to the American and, to a much lesser extent, the British situation, employer sanctions are widely understood in continental Europe to be a means of preventing the discrimination inherent in the exploitation of illegal immigrants by wayward employers. The possible discrimination-engendering effects of employer sanctions simply have not been an issue in France and other continental European countries with which the author is familiar. The transatlantic contrast in perceptions seemed sharpest when all major Democratic candidates for the U.S. Presidency in 1984 declared

their opposition to the Simpson Mazzoli legislation on the ground that the legislation, and in particular employer sanctions, would lead to additional discrimination against Hispanics. At roughly the same time, the Socialist government in France was announcing steps to enhance enforcement of various laws intended to curb illegal immigration.[2]

Despite important dissimilarities between the various major migrant-receiving countries of Western Europe and the United States, Western European experiences with employer sanctions may have important implications for U.S. views on employer sanctions and their implementation. Several continental European states have had employer sanctions for a decade now, most notably France and the FRG. This time span permits tentative analysis of possible repercussions of employer sanctions and of their effectiveness in curbing illegal immigration.

The French Experience: Stronger Enforcement Since 1982

In 1975, the French government set up a "judicial mission" to coordinate the actions of public authorities aimed at suppressing illegal immigration and employment.[3] An interagency group, the Interministerial Liaison Mission to Combat Manpower Trafficking, was officially instituted in 1976, the same year in which employer sanctions became operative. In July 1976, a law went into effect that reinforced penalties against individuals who aided illegal immigration and created an administrative penalty for employers of irregular-status migrants, requiring them to pay to ONI, the French immigration agency, a sum equivalent to five hundred times the minimum hourly wage for each worker illegally employed. In 1980, the fine was 4,275 francs (about $1,000).[4] This administrative fine was automatic in principle, above and beyond any penal sanction that might be imposed on an offending employer, including imprisonment from one to two months and longer in the case of repeat offenders. For many years, actual collection of the administrative fine was haphazard as complaints against employers were not communicated properly to the ONI and many offenders were not located. Enforcement of the fine, however, has im-

proved in recent years. According to the first annual report of the Interministerial Liaison Mission, the government chose to emphasize control over the employment of aliens more than other possible solutions to illegal migration and employment because limiting the entry of aliens into France was impractical.[5]

One of the major functions of France's Interministerial Liaison Mission is to keep track of enforcement of the panoply of laws aimed against illegal immigration and employment. Employer sanctions are only part of an impressive legal arsenal that has built up. An overview of overall legal enforcement since 1976 as measured by legal complaints *(proces-verbaux)* made by various enforcement agencies reveals a 1976 upsurge in enforcement followed by a decline, precipitous in 1977, 1978, and 1981, prior to a dramatic resurgence in 1982 and 1983. The upsurge in enforcement since 1982 mainly can be attributed to the police and labor inspectors.

The number of infractions by employers against section L341-6 of the Labor Code, which specifically penalizes employers for hiring irregular-status aliens, in 1976 and 1977 amounted to 1,624 and 2,208 respectively.[6] The level of enforcement of employer sanctions strictly speaking correlates closely with ups and downs in overall enforcement of laws against illegal immigration and employment.

The annual report for the year 1979 by the Interministerial Liaison Mission summarized the first four years of enforcement of the 1976 law reinforcing employer sanctions as follows:

> "After four years of functioning, it is necessary to recognize that the objective was not totally attained and that irregular-status alien employment remains an important problem both with regard to the employment situation and on the social and human level of those workers themselves. On the other hand, it is difficult to evaluate the number of clandestine foreign workers and thus to know whether it is more important in 1980 than it was in 1976."[7]

Evaluation of the effectiveness of employer sanctions over the 1976-

1979 period was complicated by a number of factors. Among them was the continuation of France's legalization of certain classes of foreign residents. A number of "exceptional" collective legalizations occurred during this period, particularly in the spring of 1980 when some four thousand Parisian garment industry workers, primarily Turks, were granted legal status.[8] The legalizations diverted enforcement manpower as a good number of labor inspectors, who are always in short supply, were involved in carrying it out.[9]

Initial Obstacles to Enforcement

Among the barriers to more effective enforcement during this period, certain problems stood out. Many employers adapted to employer sanctions by masking their activities. Hence, enforcement became an increasingly complicated matter requiring close cooperation among various agencies — cooperation that was not always readily forthcoming. There also was a dearth of specialized agents, particularly labor inspectors, to enforce the laws. Many labor inspectors were uncomfortable with employer sanctions and other laws aimed against illegal migrant residency and employment. In 1978, only a little more than 1 percent of the total legal complaints filed by labor inspectors concerned infractions pertinent to foreign labor.[10] There appeared to be a large gap between the perceived threat of illegal immigration on the governmental level and perception of the phenomenon by the judiciary and local officials. Employer sanctions simply were not enforced in many areas in southern France[11] and judges often did not punish offending employers.[12] Still, the concept of employer sanctions was far from discredited. Employer sanctions had only been in existence for a few years and one would normally expect quite a number of initial coordination and implementation problems. The Socialist victories in the 1981 presidential and legislative elections would have important effects upon enforcement.

Initial German Enforcement Problems

Similar barriers to more effective enforcement of employer sanctions

While there certainly were numerous obstacles to enforcement of employer sanctions in the FRG apparent in 1981, there also seemed to be broad agreement that employer sanctions were a necessary component of any strategy to curb illegal alien residency and employment.

14 were also apparent in the German context by 1981. As in France, there is a panoply of German laws concerning illegal immigration and employment. The German employer sanctions, strictly speaking, are provided for by paragraphs 227 and 229 of the Employment Promotion Act, and include fines, prison terms, and a requirement for employers to pay for an alien's trip home.

A large number of employers of irregular-status aliens receive warnings only. Prosecution is focussed on employers who repeatedly flout the law and who most exploit aliens. Enforcement of employer sanctions is limited to specific individuals, as firms cannot be prosecuted.

By 1981, the estimated number of irregular-status migrants in the FRG ranged from 200,000 to 300,000, about the same size as the estimated irregular-alien population in France at the time.[13] The problem of illegal alien employment was particularly severe in the FRG's construction industry and in hotels and restaurants. Employers of illegal aliens often realized huge profits, particularly in the construction industry, as much of the work was off the books *(Schwarzarbeit)*, and therefore employers would not pay high German payroll taxes. In some instances, the 50,000 deutsche marks ($25,000) penalty foreseen for employment of each irregular-status alien worker did not stop employers. They simply made so much illegally that the employer sanction fine was derisory. Poor coordination and communication among various agencies dealing with illegal alien employment hampered follow-up prosecution for violation of social security laws. Prohibitions against the sharing of information between various agencies also hampered enforcement. The official in charge of enforcement of employer sanctions in the German Federal Ministry for Work and Social Order requested authorization to hire three hundred additional inspectors in 1981.[14] While there certainly were numerous obstacles to enforcement of employer sanctions in the FRG apparent in 1981, there also seemed to be broad agreement that employer sanctions were a necessary component of any strategy to curb illegal alien residency and employment.

It is important to stress the linkage made by the French government between curbing illegal alien employment and residency on one hand, and the integration of resident alien communities on the other, as it closely resembles the rationale behind the immigration control legislation in the United States. Illegal alien immigration and employment is recognized as jeopardizing the status of legally resident aliens.

Stricter French and German Laws

In 1981, both the French and the German governments passed new laws reinforcing employer sanctions. The Germans increased the maximum fine per alien employed to 100,000 deutsche marks, ($50,000) effective January 1, 1982. To improve coordination among various agencies and levels of government, the Federal Labor Office established a network of twenty-five priority offices for combatting illegal employment.[15] An important difference between France and the FRG arises from the broader, more inclusive, German approach to combatting illegal alien employment. In France, illegal alien employment is seen as a specific aspect of the broader problem of the underground economy, but the Interministerial Liaison Mission's authority is restricted to coordinating measures against illegal alien residency and employment only. In the FRG, the agencies involved are authorized to coordinate enforcement of law against employment in the underground economy in general.

In France, the law of October 17, 1981, made employment of irregular-status aliens a criminal offense subject to fines of 2,000 to 20,000 francs ($285 to $2,850) and imprisonment from two months to a year. For repeat offenders, the prison term could reach two years and the fine forty thousand francs. Separate fines could be imposed for each individual alien involved.[16] The French government, however, simultaneously announced a legalization program and employer sanctions were not to be enforced until it ended. The legalization period took longer than expected as additional categories of aliens, such as seasonal workers, were permitted to apply. Hence, the marked drop in enforcement of employer sanctions in 1981 is a direct consequence of French legalization policy.

Enforcement of employer sanctions did not resume in France until well into 1982. Still later, on August 31, 1983, the French government adopted a series of measures proposed by the Interministerial Liaison Mission which simultaneously aimed at reinforcing the effort to curb illegal alien residency and employment while promoting the integration or "insertion" of legally resident alien communities in France. It is important to stress the linkage made by the French

government between curbing illegal alien employment and residency, on one hand, and the integration of resident alien communities on the other, as it closely resembles the rationale behind the immigration control legislation in the United States. Illegal alien immigration and employment is recognized as jeopardizing the status of legally resident aliens. This linkage was made explicit in the 1983 annual report of the Interministerial Liaison Mission.

> "Stopping clandestine immigration, combatting employers of irregular-status aliens, and controlling migratory flows effectively constitute a priority objective (for the French government). Failure in this case would put in doubt the insertion of legally resident alien communities in France."[17]

The August 31, 1983, measures increased the administrative fine for employers of irregular-status aliens from five hundred to two thousand times the minimum hourly wage for each alien illegally employed. As of January 1, 1985, the administrative fine was 26,340 francs.[18] The Interministerial Liaison Mission staff was increased, allowing the Mission to open up a regional office in Marseille. The number of specialized labor inspectors was authorized to increase to fifty-five. Police forces were also authorized to assign higher priority to immigration law enforcement, particularly in areas of the South with large concentrations of illegal immigrants.[19] In September, the senior French judicial official reiterated to all public prosecutors the government's view of the grave consequences of illegal alien employment and called upon prosecutors to step up enforcement of laws prohibiting illegal alien employment. Prosecutors were also asked to "rigorously apply" the text of the laws concerning penalties.[20]

In June of 1984, the French created the first of twenty-three priority departmental (county) coordinating committees, which had been previously authorized by a government memorandum of November 21, 1983.[21] Their objective was to facilitate the exchange of information so as to more effectively detect and sanction violations stemming from illegal alien employment.

The tone of recent French government assessments of their policy against illegal immigration and employment has been quite upbeat. There clearly is an official perception that enforcement of employer sanctions is beginning to bear fruit.

In France, an "encouraging balance sheet"

The end of legalization in France combined with the measures taken in 1983 and 1984, have resulted in a marked increase in enforcement of laws against illegal immigration and employment as measured by legal complaints communicated to the Interministerial Liaison Committee. The total of 2,245 *proces verbaux* communicated to the Mission in 1983 was the highest ever. The number of *proces verbaux* for infraction of the Labor Code provision which prohibits employment of irregular-status aliens, rose from 549 in 1982 to 947 in 1983. The record number of 2,266 total *proces verbaux* had already been surpassed by mid-1984 as some 2,519 legal complaints had been communicated to the Mission by March of 1985.[22]

The increase in legal complaints was matched by increased court action, enforcement of the administrative fine, and penalties against employers of irregular-status aliens. About thirteen hundred court decisions ordering employers to pay fines of at least two thousand francs were made during 1983. In Paris, the first six months of 1984 witnessed a 50 percent increase in the number of persons found guilty of employing illegal aliens relative to the 1983 period.[23] The Director of the Interministerial Liaison Mission summed up the judiciary's handling of employer sanctions over the first six months of 1984 as follows:

> "The sampling of judgements rendered during the first half of 1984 by various courts appears to us as very indicative of the current tendency toward hardening of legal counteraction *vis a vis* employers of irregular-status aliens. The great majority of fines are to be found from now on above the minimum provided by the law, which denotes a clearcut understanding by the courts of matters connected to manpower trafficking."[24]

The tone of recent French government assessments of their policy against illegal immigration and employment has been quite upbeat. There clearly is an official perception that enforcement of employer sanctions is beginning to bear fruit. The 1981-1983 period is seen

as a stage where the policy instruments decided upon in 1981 were "broken in." The policy outlined in 1981 on paper has since taken concrete form. In March of 1985, Mrs. Georgina Dufoix, the Minister of Social Affairs and National Solidarity and the spokesperson for the French government, declared that the results of enforcement of laws against illegal immigration and employment have a ". . . very encouraging balance sheet."[25]

Western Europe's Commitment to Enforcement

The French government clearly intends to pursue its current strategy against illegal immigration and employment. Employer sanctions play an important role in that strategy. Much the same can be said for the rest of continental Europe. The Swiss decision to adopt employer sanctions in 1984 seems to confirm the trend. The most recent German government report on enforcement of laws against black market or illegal employment in general suggests that the number of illegal aliens in the FRG may have decreased in recent years, but that it would be difficult to attribute any decrease to enforcement of laws such as employer sanctions.[26]

In September, 1984, the Parliamentary Assembly of the Council of Europe adopted a recommendation to the Committee of Ministers on Clandestine Migration in Europe which strongly endorsed the concept of employer sanctions. The recommendation called for ". . . laying down severe administrative and legal sanctions for employers of clandestine workers, intermediaries and traffickers, so as to impose the same charges on all firms and to prevent illicit migration by providing equal treatment and working conditions for migrant workers."[27]

Employer sanctions are components of broader strategies to curb illegal immigration and employment. Alone, they are not seen by Western European governments as a possible panacea for the profoundly complex phenomenon of illegal alien immigration and employment. They are, however, generally perceived as a valuable, indeed necessary, deterrent. Illegal immigration and employment is viewed as a long-term and likely increasingly severe problem in Western Europe.

. . .the publicity campaigns undertaken to sensitize judges and the public at large to the perceived prejudicial consequences of illegal alien employment seem to have had an effect in both countries. Judiciaries now seem to be reponding to calls for firmer enforcement of laws prohibiting illegal alien employment.

Employer sanctions are valued as a medium-term public policy instrument, but there are few illusions that employer sanctions alone could "solve" the problem over the long run.

The Western European experience with employer sanctions over the past decade reveals a number of problems and issues associated with laws penalizing employers for hiring irregular status aliens. Perhaps the most important of these problems is a lack of general understanding of the phenomenon of illegal migration. Insufficiently understood is that employer sanctions represent only a stop gap measure in the absence of an intelligent, long term public policy response to the problem of illegal immigration. Enforcement of Western European employer sanctions has been hampered by a lack of understanding of the sociopolitical and labor market mechanisms which, in a sense, create illegal alien immigration and employment. The most recent annual report of France's Interministerial Liaison Mission, however, suggests progress toward understanding the complex reality of the phenomenon.

Publicizing the Costs of Illegal Immigration

The gap between governmental perceptions of the social disorder created by illegal immigration and employment on one hand, and the indifference of some institutions and elements of the public at large to the problem on the other, also has hindered enforcement of employer sanctions. A key component in the overall strategies of several Western European governments is publicizing the gravity of the threat posed to society by illegal immigration and employment. Western European governments have found that their judicial systems in particular have been slow to regard illegal alien employment as a serious matter. Officials in both the FRG and France complain that judges have often been too lax with offending employers. However, the publicity campaigns undertaken to sensitize judges and the public at large to the perceived prejudicial consequences of illegal alien employment seem to have had an effect in both countries. Judiciaries now seem to be reponding to calls for firmer enforcement of laws prohibiting illegal alien employment.

20 Employer sanctions, like other laws, are expected to deter certain kinds of behavior. Most European employers comply with the laws voluntarily. It takes considerable manpower and other resources to penalize those employers who do not comply. In France and the FRG, enforcement of employer sanctions has been limited by manpower constraints. Hence, early enforcement strategies have emphasized exemplary cases to encourage voluntary compliance.

Employer Tactics for Evasion

A minority of employers have responded to employer sanctions by going underground or concealing their activities through dummy or front businesses. The growth of subcontracting in particular often makes it difficult for labor inspectors and other agents to sanction employers of irregular-status aliens. Enforcement is complicated by legal, logistical, and physical constraints but Western European governments have increased the manpower available for enforcement and have taken steps to improve coordination between various agencies and levels of government so as to prosecute employers hiding behind subcontractors, who often are themselves aliens, or using other devices to disguise their employment of illegal aliens.

The complexity of detecting, charging, and prosecuting many offending employers hinders enforcement. This is why specialized agents concentrate their enforcement activities on so-called exemplary cases, which are likely to be publicized and perhaps deter some employers from engaging in similar unlawful employment practices. Enforcement is also targeted against the worst offenders, those employers who most exploit irregular-status aliens. In general, the growth of the underground economy has weakened the deterrent effects of employer sanctions.

In a number of instances, political considerations have limited or precluded enforcement of employer sanctions. According to one observer, Swiss officials frequently "look the other way" if irregular-status aliens perform employment services regarded as necessary or vital.[28] Much the same has been true in agricultural areas of south-

In France there is little or no evidence that employer sanctions have increased employment discrimination against citizens and legally resident aliens of North African Arab background.

ern France, such as the Midi,[29] although the French government has brought charges against a number of farmers. Some industries with political clout and well-entrenched traditions of using illegal alien labor have been exempted from enforcement of employer sanctions. In cases like these, a long-term approach to eliminating the structural causes of illegal alien employment is needed. In these instances, foreign policy and trade practices become important components of a comprehensive approach to immigration policy. Most Western European employers, it should be stressed, view illegal alien employment as harmful to society and as an unfair labor practice.

Employer Sanctions and Discrimination

The United Kingdom ruled out employer sanctions in part because it feared they might lead to additional discrimination against minorities. Fears of possible discriminatory effects of employer sanctions have been voiced in France as well.[30] Nonetheless, putative discriminatory effects of employer sanctions have not been an issue in continental Europe. In the United Kingdom, the Select Committee on Race Relations and Immigration actually recommended that employer sanctions be adopted.[31]

In France, there is little or no evidence that employer sanctions have increased employment discrimination against citizens and legally resident aliens of North African Arab background. Under the 1972 anti-discrimination law, a citizen or legally resident alien could seek redress if he or she were discriminated against by employers. Issues of discrimination are usually well publicized and often are quite politicized in France. Unfortunately, discrimination against persons of Arab background is a deadly serious and quite pervasive phenomenon, but employment discrimination against them appears to arise from factors other than employer sanctions. It cannot be ruled out that employer sanctions have contributed to a certain stigmatizing of North African Arabs which may indirectly affect their employment opportunities. Hence, there might be some unintended linkage between the French government's campaign against illegal immigration and the growing unemployment of Algerians and other North African legal

Many Western Europeans view the issue of discrimination and employer sanctions in terms other than those most commonly heard in the United States. They see illegal alien employment as inherently discriminatory and abusive of the aliens involved. Consequently, employer sanctions are viewed as a means of combatting discrimination and exploitation.

residents in France.[32] But the government views the relationship differently. Control of illegal immigration and employment is seen as a necessary precondition to better integration of France's legally resident alien communities.

Racism is a problem all across Western Europe and most observers would agree that racism and racial tensions have grown in recent years. The French government's viewpoint that continued illegal immigration exacerbates discrimination and resentment against foreigners makes sense in this context. Employer sanctions, however, do not appear to have triggered this phenomenon.

Many Western Europeans view the issue of discrimination and employer sanctions in terms other than those most commonly heard in the United States. They see illegal alien employment as inherently discriminatory and abusive of the aliens involved. Consequently, employer sanctions are viewed as a means of combatting discrimination and exploitation. It seems improbable that the International Labor Organization (ILO), in Convention 143, would adopt a concept that was inherently discriminatory against minorities and against the resident alien populations which are the ILO's special responsibility to protect.

Implications for the United States

There appears to be little factual basis for an argument that employer sanctions have not worked in Western Europe, so they will not work here. Such an argument grossly overstates what can be learned through comparison and conveniently ignores or distorts the actual Western European experience with employer sanctions. Employer sanctions simply have not been a major issue in Western Europe. Many Western European countries have them and view them in a generally positive light. The fact that the ILO recommends adoption of employer sanctions and that most continental European countries have them has had the effect of creating an international norm or expectation of some significance to the past U.S. debate over their enactment and the current discussion over their implementation.

Employer sanctions are a possible medium-term solution, or more appropriately, partial solution to the illegal immigration problem faced by industrial democracies. The long-term solution is to be found in decisions which restructure labor markets and industries so as to eliminate the root causes of illegal immigration and employment.

The Western European experience with employer sanctions suggest that employer sanctions are not inherently discriminatory against racial or ethnic minorities. There is some potential for possible employment discrimination associated with employer sanctions in societies like France and the United States, but the possibility of legal remedy and public vigilance should limit this potential problem. This potentiality should be weighed against salutary effects that can be expected from penalizing employers who exploit irregular-status aliens.

Employer sanctions and labor law enforcement often appear as elements of a zero-sum game in the U.S. approach to immigration reform—either you have one or the other. The United States clearly should take note that labor law enforcement and enforcement of employer sanctions go hand in hand in continental Europe.

Employer sanctions can be a valuable component of a broad strategy to combat illegal immigration and employment. Their effectiveness, however, is contingent upon a number of factors including, for example, the obvious need to commit sufficient personnel and financial resources.

But the effectiveness of employer sanctions also is linked to a comprehensive approach to illegal immigration and employment. If the wrong choices are made in a host of related policy areas, of taxation, trade, foreign affairs, and manpower policy, employer sanctions may only achieve pyrrhic results.

This analysis of employer sanctions in Western Europe has attempted to illuminate the strengths, weaknesses, and limits of the concept of employer sanctions. Employer sanctions are a possible medium-term solution, or more appropriately, partial solution to the illegal immigration problem faced by industrial democracies. The long-term solution is to be found in policies which restructure labor markets and industries so as to eliminate the root causes of illegal immigration and employment.

NOTES

1. *The Wall Street Journal*, May 30, 1985

2. A series of measures adopted by the French cabinet on August 31, 1983, were implemented from late 1983 through 1984. See *Lutte Contre Les Trafics de Main d'Oeuvre*, (Prefecture de Paris, June 1984).

3. Mission de liaison interministerielle pour la lutte contre les trafics de main d'oeuvre, *Bilan ... pour l'annee 1979*, (Paris: Secretariat d'Etat aupres du Ministere du Travail et de la Participation, August 1980).

4. *Ibid.*, p. 17.

5. Mission de liaison ..., *Bilan ... pour l'annee 1979*, 1.

6. Mission de liaison ..., *Bilan ... pour l'annee 1980*, (Paris: Secretariat d'Etat aupres du Ministre de la Solidarite Nationale Charge des Immigres, August 1981), 9.

7. Mission de liaison ..., *Bilan ..., pour l'annee 1979*, 2.

8. "Immigration Clandestine," *Bulletin Mensuel des Statistique du Travail*, number 106, (1983), 12.

9. Mission de liaison ..., *Bilan ... pour l'annee 1980*, 5.

10. *Ibid.*

11. See, for example, Jean-Pierre Berlan, "Labor in Southern French Agriculture," in Paul Martin, ed., *Migrant Labor in Agriculture: An International Comparison*, 61-62.

12. Mission de liaison ..., *Bilan ... pour l'annee 1980*, 10-13.

13. See respectively, R. Rist, p. 78 and Jacqueline Costa Lascoux and C.W. de Wenden-Didier, "Les Travailleurs Immigres Clandestins en France," Etudes Migration, number 63 (1981), 7.

14. Interview, November 1981.

15. *Illegale Beschaeftigung und Schwarzarbeit duerfen nicht sein.*

16. ONI, *La Lutte Contre l'Emploi Irregulier et les Trafics de Main d'oeuvre etrangere*, Paris: ONICLASSEUR document, E.8.

17. Mission de liaison ..., *Bilan ... pour l'annee 1983*, 19.

18. *Ibid.*, 19.

19. *Ibid.*, 15.

20. *Ibid.*, 21.

21. *Liaisons Socials*, Number 34/85, (March 25, 1985), 3.

22. *Le Quotidien de Paris*, March 26, 1985.

23. *Ibid.*

24. *Ibid.*

25. Agence France-Presse dispatch, March 25, 1985.

26. *Fuenfter Bericht der Bundesregierung ueber Erfahrungen bei der Anwendung des Arbeitnehmerueberlassungsgesetzes*, 7, 34-35.

27. Unclassified U.S. Department of State telegram, September, 1984 and Mission de liaison ..., *Bilan ... pour l'annee 1983*, 159-161.

28. Remarks made by W.R. Bohning at a GMFUS - sponsored seminar in March 1985.

29. *Op. Cit.*, Jean-Pierre Berlan, 61-62.

30. See, for example, Mission de liaison ..., *Bilan ... pour l'annee 1980*, 72.

31. "Immigration" Survey, April 1978, 112-32. Jacqueline Costa-Lascoux expressed such a concern to the author in a recent letter.

EUROPE'S LESSONS FOR AMERICA
By
Malcolm R. Lovell, Jr.

- Similarities in the Migration Experience
- United States-European Differences
- The Tradition of Voluntary Compliance
- Employer Sanctions and Labor Laws: An Enforcement Partnership
- Government-wide Cooperation
- Closing the Loophole of Subcontracting
- Creating the Political Climate for Success
- Employer Cooperation is Critical
- Secure Identification: An Imperative
- Paying for the Enforcement We Need
- Employer Sanctions: A Safeguard for the Vulnerable Newcomer
- Toward An Economy Without Illegal Alien Workers
- Employer Sanctions, A Discipline for Economic Competitiveness

Of the European countries surveyed by the General Accounting Office (GAO) in 1985, only one, Italy, still reports that its sanctions laws have failed to help. Not surprisingly, the Italians give as the reasons weak penalties and too few enforcement officers.

28 Similarities in the Migration Experience

It took the United States fifteen years of legislative travail to enact in late 1986 penalties against employers of illegal aliens, a legislative concept that major continental European democracies have accepted and regarded as unexceptional for over a decade. The Immigration and Naturalization Service (INS), the Department of Labor, and involved U.S. agencies are now on the unfamiliar ground once trod by European officials as they search for enforcement strategies that make employer sanctions deter illegal immigration effectively, economically, and humanely when they become fully effective in June 1987.

Most Western European states enacted employer sanctions in the mid-1970s (the Federal Republic of Germany (FRG) in 1975, France in 1976), but effective enforcement did not come immediately or automatically. This is the first important transatlantic lesson for the United States. Major European governments went through their own prolonged period of trial, error, and adaptation in making the same legal concept an effective means of immigration control and protection of labor standards. Most of them faced such predictable enforcement obstacles as unforeseen loopholes, bureaucratic confusion or indifference, inadequate enforcement resources, public apathy, and toothless penalties. Each country dealt with these problems in its own way with varying degrees of success. And for most of them, it took five years or more to make the changes needed to make their laws begin to work. Now, of the European countries surveyed by the General Accounting Office (GAO) in 1985, only one, Italy, still reports that its sanctions laws have failed to help. Not surprisingly, the Italians give as the reasons weak penalties and too few enforcement officers.[1]

Before turning to the European experience with employer sanctions it is fair to ask what is its validity for the United States? Are the historical, social, and economic conditions of the Western European industrial nations comparable? Or are they so different from our own as to be irrelevant? There are no doubt some great differences between our societies; but there are many similarities too and we can learn from both.

29

Many Americans are surprised to learn how much we have in common with Western Europe when it comes to immigration, both legal and illegal. Both Western Europe and the United States are advanced industrial societies with high standards of living, high employment by Third World standards, and low rates of population growth. Both societies have long-standing close ties, including past colonial relationships, with extensive areas of the Third World where population growth has often far outstripped economic growth. Both societies have high discretionary income, maturing populations, and a taste for leisure, which feeds demand for many labor-intensive, low-skilled personal services. Both societies have actively recruited foreign low-wage labor in the past, or tolerated heavy inflows of it, even allowing certain industries to become dependent on it. Growers and some service industries in France and Italy see workers from North Africa as essential, just as agricultural and light manufacturing interests in California and the Southwest feel an overriding need for Mexican workers. Both societies in the past had legal foreign labor recruitment policies — *Braceros* in the United States and *Gastarbeiter* in Europe — that fostered the dependence of certain industries and built networks of illegal immigration for use once those programs ended.

Beginning in the early 1960s, German and French employers were permitted unlimited access to foreign workers. Their governments encouraged and participated in recruiting foreign workers. By 1973, when the Arab oil embargo triggered a recession and an end to foreign labor recruitment, net legal immigration into France and the FRG was more than twice as large as into the United States, with the total foreign born population approaching eight million.

As in the United States, European employers had discovered that aliens are a very desirable work force; they will accept low status, dirty jobs ungrudgingly and at lower pay than native workers would demand (though foreign workers in the French automobile industry were becoming increasingly militant). The "push" factors — poverty, population growth, unemployment — mounted as fast in Turkey and Northern Africa as they did in Mexico or the Caribbean.

Past immigration practices in both Europe and the United States have

It was recognition of the ease of illegal entry that helped to convince first the European states, and then the United States, to adopt employer sanctions. When open industrial democracies cannot implement airtight border and port of entry controls, they must rely more on interior controls, particularly at the work place.

30 spawned large welcoming foreign ethnic enclaves and employment networks that both attract and help accomodate further illegal immigration. With decolonization since World War II, and the widening income gap between have and have-not nations, the United States and Europe have become huge cultural and economic magnets for restless and ambitious young Third World migrants, further enticed by cheap and easy international travel. Both the United States and Europe have huge populations of foreign students from the Third World, many of whom have used higher education as a path to permanent settlement. Both the United States and European states confront a vast surge of asylum claims as Third World migrants seek alternatives to more selective immigration procedures.

In both Europe and the United States, concern for individual rights, privacy and due process, and a tendency to regard illegal immigration as benign, have trammeled immigration law enforcement. At the same time, the United States and Europe have traditions of racial discrimination, though they have often differed significantly in the targets of their discrimination or in the way that discrimination is expressed.

America's dilemma of controlling a long and unguarded border is not unique. Despite their considerable efforts to regulate entry at borders and airports, the continental European states are quite permeable. Their frontiers are difficult to monitor and their volume of international travel by air, sea, and land is high.

France's long borders with Spain and Italy are important entry points for illegal aliens from Africa and the Middle East. Senegalese and Malian illegal immigrants are smuggled in by Spanish "coyotes" in a fashion very similar to that on the Mexico-United States border, though the volume is much lower. The perilous route across the Pyrenees into France has its parallel in the rugged desert stretches between Mexico and the United States. And, like the United States, France has had little success in getting cooperation from its border neighbors, Italy and Spain, in suppressing illegal immigration.[2]

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first the European states, and then the United States, to adopt employer sanctions. When open industrial democracies cannot implement airtight border and port of entry controls, they must rely more on interior controls, particularly at the work place.

United States-European Differences

There are significant differences as well between United States and European societies, and they too can give us insights for effective enforcement. The United States is far larger in size and population than any single Western European nation. Within our huge nation exist broad regional, ethnic, and racial differences. Mining, lumbering, labor-intensive agriculture, and the production of other raw material have greater relative weight in our economy than in Western Europe's. The demand in the U.S. economy for unskilled workers for low-wage, dangerous, high turnover jobs is greater than in Europe, a trend that has been amplified by the rapid growth of the service sector in the United States.

Most European nations are unitary. But our federalism goes well beyond that of even Europe's federal states such as the FRG and Switzerland in affirming a stronger tradition of decentralization and state and local autonomy. These traditions, while revered, make for greater unevenness in the application of national laws and policies and often inhibit an active state and local role in such federal concerns as curbing illegal immigration.

Europeans have tended to regard immigration primarily as an option to meet labor needs, though France has encouraged it in the past for demographic reasons. But in the United States immigration has acquired a numinous character in our popular history, coming to be seen as a vital rite in our national self-expression. Thus, in U.S. politics, immigration at times becomes an end in itself rather than a practical instrument of manpower or population policy. Fear of centralization in the United States and a heightened concern for personal rights and privacy have blocked the use of the secure, uniform government identification documents that are now taken for granted

32 in much of Western Europe. By European standards, America's entire non-system of personal identification is a crazy-quilt with basic vital statistics documents — the "breeder documents" on which all other ID documents are based — now issued by more than eight thousand jurisdictions with few safeguards against counterfeiting or fraud.

The Tradition of Voluntary Compliance

Offsetting some of the enforcement handicaps in the United States, is a stronger tradition among Americans of voluntary compliance with laws, even those that are burdensome or inconvenient.

This spirit of voluntary compliance may offer the best hope for effective implementation of employer sanctions. Critics of employer sanctions have argued that they will blizzard businesses under massive record-keeping requirements, or that large numbers of businesses will simply ignore the law. But the historical record of U.S. employers' cooperation in enforcing other federal laws is encouraging. On three occasions in the last four decades, America's employers have been called on to cooperate extensively with the federal government in enforcing far-reaching federal legislation affecting their work forces: the collection and remittance of social security payroll taxes in 1939, the introduction of the federal minimum wage laws beginning in 1938, and the withholding of federal income taxes beginning in 1943. Then, as now, opponents foresaw stifling bureaucratic burdens or protested against making employers become law enforcers. But the rates of voluntary compliance by employers, and the efficiency of these largely self-enforced systems, are commendable. A 1979 congressionally ordered study found only 4.9 percent of the nation's 2.6 million employers then subject to the Fair Labor Standards Act to be in violation of the minimum wage provision — some of them unintentionally.[3] Ninety-three cents of every tax dollar collected by the Internal Revenue Service comes in through voluntary compliance.

For employer sanctions as well, enlightened self-interest and civic spirit can work together in favor of legality. With proper encouragement and leadership from the U.S. government, American employers

A clear message of the European experience is that enforcement of employer sanctions gets best results when closely coupled with enforcement of labor laws.

can come to accept employer sanctions — as have many of their European counterparts — as simply a good business practice, a safeguard ultimately for themselves against unfair competition or unearned business advantages for their competitors. It was enlightened self-interest that convinced Western Europe's most powerful employer group, the German Employers Federation (BDA), to endorse employer sanctions as needed to prevent exploitation of workers and to deter employers from unfair labor practices that undermine the German concept of a social state and social partnership.

Employer Sanctions and Labor Laws: An Enforcement Partnership

A clear message of the European experience is that enforcement of employer sanctions gets best results when closely coupled with enforcement of labor laws. The German government requires agencies and institutions responsible for social security, job placement, industrial health and safety, unemployment compensation and disability insurance, and taxes along with immigration authorities, and the police to share information on illegal alien employment. Special legislation was needed in the FRG in 1982 to make close information sharing possible. A similar commitment to interagency cooperation is apparent in France, which brought together immigration, law enforcement, labor standards, agriculture, social insurance, and revenue agencies together in a high-level interagency group to combat manpower trafficking.

The Department of Labor is a key to enforcement success in the United States no less than are its counterpart ministries in Europe. Congress recognized this in the Reform Act when it authorized in principle, but without specific sums, additional funds for the now seriously undermanned Wage and Hour Division and its Office of Labor's Employment Standards Administration Federal Contract Compliance (ESA) "*. . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens. (PL 99-603, Sec. 111 (d))*

34 ESA must now have a sizeable infusion of funds if it is to enforce existing labor standards laws adequately, much less be effective in enforcing employer sanctions. This is absolutely critical. But the recent history and current outlook on the Department of Labor's enforcement effort are not encouraging. The Wage and Hours Division now has fewer than one thousand compliance officers in the fifty states to enforce the Fair Labor Standards Act and other major labor laws. The number of covered employers and the Division's tasks have grown steadily with the economy, but the Division's enforcement manpower has actually declined since its peak in 1979. Newly legalized aliens may no longer fear to press back wage claims, adding further to ESA's workload. The number of unattended complaints of Fair Labor Standards Act violations nearly doubled between 1982 and 1986. Despite the new law's exhortation, Labor's initial budget proposals for 1988 allow further reductions in personnel for enforcement of wage and hour and federal contract compliance. Adding general employer sanctions to the Division's overburdened agenda without major personnel additions will risk a massive enforcement failure that could write early doom for the overall credibility of the Immigration Reform Law.

As Europeans learned from early enforcement disappointments, the clearest test of a government's determination to enforce employer sanctions effectively is its willingness to commit the resources in money and trained personnel needed. A buildup of ESA's staffing would yield the added benefit of improved labor standards for much of our low-wage working population already hard-pressed by a changing economy and international competition. Chiefly ESA's wage and hour and federal contract compliance arms should have compliance staff increases of the same order as those ordered for INS by the Reform Act — not less than 50 percent.

The Department of Labor's experience in enforcing the Farm Labor Contractors Registration Act also revealed an institutional conflict of interest: the concern of compliance officers that illegal aliens fearing exposure to INS would be reluctant to complain to them of other labor standards violations.[4] Some European labor enforcement officials were reluctant to enforce employer sanctions because of similar feelings — a reluctance European officials worked to overcome with

The European experience also argues for closer cooperation among Cabinet level agencies. U.S. agencies with much to contribute would be the Social Security Administration and the Internal Revenue Service (IRS).

stronger leadership and more enforcement specialization. Obviously, if such conflicts of interest persist, they must be resolved if the Department of Labor is to contribute fully to enforcement. 35

Enforcement could also be strengthened if other functions of the Department of Labor whose activities put them in close contact with the workplace were to share information about patterns of illegal alien employment.

Federal and state employment offices must develop rigorous, consistent and uniform standards for verifying the work eligibility of applicants before making referrals. Current legislation makes verification of referrals optional for state employment services. The prospect of federally supported agencies referring aliens barred by federal law from working would hardly be positive leadership. It would be in the interest of employers to insist that state employment services carry out this responsibility. State agencies would gain by assuming this enforcement role.

Government-Wide Cooperation

The European experience also argues for closer cooperation among Cabinet level agencies. U.S. agencies with much to contribute would be the Social Security Administration and the Internal Revenue Service (IRS). Consistent with current privacy rules, the Social Security Administration should share with enforcement agencies information about presumptive employers of illegal aliens that have come to its attention in the course of its normal investigations. Current working arrangements between INS and the Inspector General of the Department of Health and Human Services should be expanded and strengthened to probe social security non-compliance and identification fraud. The 1976 tax reform legislation curbed the access of INS to Social Security and IRS files, weakening an important enforcement tool. INS should be allowed greater use of that data for strict enforcement purposes, consistent with basic privacy safeguards.

The Internal Revenue Service has in the past probed illegal alien em-

ployment only to the extent that its revenue collections were affected. Since IRS has seen the leakage of this revenue as small compared to other forms of tax evasion, this has had a low priority.[5] IRS involvement now might yield greater returns. The employment of illegal aliens "off the books" has expanded along with the general growth of the underground economy that now troubles IRS. Legislative and regulatory changes are needed to permit IRS to share information with INS when its audits of employers reveal evidence of persistent employment of illegal aliens. Initial draft enforcement rules for employer sanctions grant INS and Department of Labor officials ready access to an employer's file of eligibility certifications. Similar access should be extended to officials of IRS.

State and local governments have increasingly tended to take a "leave it to the Feds" attitude on immigration control; some have even openly withheld their cooperation from INS. But France and the FRG in recent years have stepped up the involvement of local police forces. Local law enforcement agencies around the United States were warned away from a role in immigration enforcement by a directive of Attorney General Griffin Bell in 1978. While that ban was rescinded in 1983, local law enforcement agencies in many areas of the country are still dissuaded from enforcement cooperation by political pressures from immigrant groups, or because resources once devoted to helping INS have been diverted. Some stopped cooperating because INS was often too overtaxed to respond. State and local enforcement agencies for wage and hour, industrial safety, and other labor laws must be encouraged to share information with federal agencies about patterns of illegal alien employment. Federal cost sharing, training, grants, or other financial incentives would quicken state and local cooperation.

Closing the Loophole of Subcontracting

As their enforcement efforts matured, the Europeans discovered that additional measures were needed to halt the use of subcontracting and dummy fronts to evade the law. Some European employers showed remarkable adaptability. As a result of testimony to Congress about the European situation, our reform legislation showed foresight

Unless enforcement is vigorous, the law could accelerate existing trends in industry to subcontract a greater share of production — first to evade unionism and now labor standards and employer sanctions laws. The hostility of AFL-CIO affiliates to the increasing practice of subcontracting reinforces the common interest between labor and immigration enforcement.

in applying sanctions to those who knowingly use "contracts, subcontracts or exchanges" to hire illegal aliens. But the opportunities in subcontracting for abuse and concealment will remain a major enforcement challenge. Some critics of sanctions have warned that larger firms who feel harassed by INS will subcontract out more work to smaller firms that are typically non-union and which will continue to hire illegal aliens.[6] Unless enforcement is vigorous, the law could accelerate existing trends in industry to subcontract a greater share of production — first to evade unionism and now labor standards and employer sanctions laws. The hostility of AFL-CIO affiliates to the increasing practice of subcontracting reinforces the common interest between labor and immigration enforcement.

Employer Cooperation is Critical

The cooperation of employers in the United States is no less critical than it was in Europe. The Department of Labor and INS must continue to work closely with employers, particularly in immigrant-impacted areas, to encourage voluntary compliance and full use of citizens, legal residents, and the newly legalized to meet their workforce needs. INS can build on its experience with "Operation Cooperation" since the 1970s, in which it has worked with nearly eleven hundred key employers or employer groups nationwide to encourage voluntary use of legal resident or citizen labor. Voluntary compliance can rely only partly on goodwill and civic spirit, it must be accompanied by both convincing incentives and disincentives.

Because of the chronic shortage of investigators, INS, like European enforcement agencies, must continue to concentrate on notorious violators, targetting its limited enforcement efforts to areas of greatest payoff. As many as four million employers in the United States are estimated to be subject to the sanction legislation. But only about 10 percent of them, INS estimated, now employ illegals.[7] INS's staggering monitoring and enforcement task becomes considerably more manageable if the agency can concentrate its investigative efforts on the relatively small percentage that INS knows from long experience to be likely offenders.

38 But even after it adds the some four hundred additional compliance personnel for employer sanctions planned by 1988, INS will still be hard pressed to cover all potential violators. If INS is to rely on deterrence through convictions of notorious violators, early success is essential to that strategy. INS and the Justice Department must pick the initial cases for prosecution with particular care. Defeat of the government at the outset in major exemplary cases will severely damage the credibility and momentum of the enforcement effort.

INS knows from decades of experience which areas and industries most often use illegal alien labor and where to concentrate its enforcement effort for the greatest payoff. At the same time, it is essential that enforcement be uniform across all industries and geographical regions. The law will lose credibility and business competition will be distorted if, for example, the government enforces the law more rigorously against the New York area apparel industries than those of Los Angeles County; or if growers in the San Joaquin valley receive greater lenience than those of the lower Rio Grande valley; or if construction entrepreneurs in Houston are free to flout the law, while those of that city's hotel and restaurant trade are held closely to account.

It is dismayingly clear from European and American experience that chronic reliance on illegal alien labor has deep roots that cannot be removed overnight. The preference of some employers for illegal workers will not change simply with the implementation of employer sanctions, even if suitable citizen workers are offered. They must accept other changes in their basic approach toward labor and its use, and some of these changes may be disruptive for them.

An illustration of the resistance to change is apparent in "Operation Jobs", a targetted effort by INS in the spring of 1982 that removed nearly six thousand better paid illegal aliens from jobs at some 560 work sites and encouraged their replacement with legal residents. Subsequent assessments of "Operation Jobs" have shown that the number of replacements by citizen workers was low, or that those citizens and legal residents taking the jobs did not remain in them long. The mixed success of the effort — often exaggerated by opponents of em-

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ployer sanctions — stems in part from some enforcement restraints that the passage of employer sanctions and an increase in enforcement personnel will now overcome, and in part from entrenched employer attitudes. Chronic employers of illegals at that time, with no legal obligation to hire legal workers, had no incentive to change long-set employment preferences. They simply replaced the illegals removed with other illegals. Delays by State Employment Services in making referrals for the job openings, or their inability to make referrals without an employer request, prevented the rapid filling of vacancies,[8] suggesting a need for better employment service procedures and closer cooperation among agencies. Complaints of high turnover among citizen replacement workers were often self-serving as they ignored the high turnover rate of illegal workers in those same industries where pay, upward mobility, and working conditions are chronically poor.

With employer sanctions now the law of the land, "Operation Cooperation" has become the "Lawfully Admitted Workers" program (LAW), a coordinated effort of INS, the Department of Labor and other concerned agencies to encourage compliance among employers and help them find legal workers for jobs. The success of LAW will depend on the numbers and effectiveness of compliance officers, cooperation among enforcement agencies and their willingness to give it adequate priority, and employers' conviction that the risk of detection of violations is great and the penalties steep.

An educational approach would be to encourage employers to post notices for all employees, actual and prospective, of the requirements of the immigration law and the penalties that employers and employees risk in violating it. Following the practice used in the 1960s and 1970s in extending Equal Employment Opportunity, employers might also affirm their commitment to hire only lawfully admitted workers in their vacancy notices and advertisements. Employers who make and display such warnings, should have these practices taken into account as part of the grounds for an affirmative defense in the case of prosecution.

But education must go hand-in-hand with convincing disincentives.

40 Fines assessed must be carefully evaluated to see if they are really deterring, or are simply accepted as a cost of doing business. Stronger penalties used by the Europeans might be adapted for use here. In France, repeat offenders risk seizure of tools and equipment, similar to INS's current authority to seize the conveyances of alien smugglers. In the FRG, offending employers who are aliens risk deportation.

Properly enforced, employer sanctions can become a major safeguard for the wages and conditions of millions of immigrants and less privileged U.S. workers. But weakly enforced, as opponents of sanctions have warned, they can become another device for unscrupulous employers to exploit or intimidate illegal alien workers, while shifting the costs of violations to the workers themselves. The new law explicitly forbids employers from seeking indemnity bonds or guarantees from workers. But those determined to evade the law have more subtle ways of covering their risks at the expense of workers that will require enforcement vigilance. The prohibition of indemnity bonds should be interpreted broadly or redefined as necessary to abuses with similar intent such as special check-offs, deductions, kickbacks, or contributions to special repatriation contingency funds.

Creating the Political Climate for Success

Worth stressing is that in the first several years after enactment of employer sanctions, change was slow in Europe. Time was needed to explain the law, and to adapt and educate the bureaucracy and the public. Time will be needed in the United States as well, though excessive delay may risk raising public cynicism or disillusion about the likelihood of change. We should guard against the "quick fix mentality," the tendency of politicians to equate the passage of a law with real change and to turn to other problems. Visible support at the cabinet level of government and continuing congressional interest are needed to sustain momentum. It will take time and patient leadership for the public, employers of illegal aliens, public officials at all levels, smugglers, and the illegal aliens themselves to realize that our priorities have changed and that employer sanctions are now the law of the land.

If enforcement is successful, it will inevitably pinch some industries, who will cry foul or demand relief. This has been the European experience also. It will take the greatest of discipline in Congress and at the upper levels of the executive branch to resist the temptation to interfere with INS measures or to grant *ad hoc* exemptions.

Some of the major steps INS must take to enforce employer sanctions successfully will also have high non-monetary costs in determination, discipline, and political will. INS must have the close and visible backing of the White House, the Attorney General, and Congress for enforcing employer sanctions evenhandedly in major illegal immigrant impact areas. One major handicap in Europe cited in the 1982 GAO study was insufficient zeal among prosecutors who, like some of their U.S. counterparts, tended to see immigration violations as benign or promising only a low payoff. Strong leadership and clarity of priorities will be needed here as much as in Europe. 41

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Secure Identification: An Imperative

Western European societies show that effective tamper-proof personal identification systems are compatible with high regard for individual privacy and rights. The availability of secure, universal identification is the single greatest difference between the United States and most European countries. U.S. law relies for verification on early counterfeited or abused ID documents such as birth certificates, driver's licenses, foreign passports bearing INS authorization stamps, and social security cards. The current system of identifiers is an invitation to widespread abuse and a defense for ill-intentioned employers, but a source of confusion for the conscientious. The current verification and record-keeping provisions of the law are a burden for employers that could undercut their support for enforcement. The executive branch needs to move rapidly toward a secure universally applicable system for verifying the eligibility to work of all U.S. residents without discrimination, while lessening the verification burden on employers and the attendant risks of discrimination charges.

Current enforcement practices have created nine categories of resi-

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dent aliens with unrestricted right to work and fourteen more non-immigrant categories with temporary or conditional work authority. The variety of documents invites abuse and confuses the well intentioned employer. INS should move toward a single secure ID document for all with work authorization and should seek reinstatement of the annual alien registration requirement ended in 1981. Both measures would ease monitoring of the alien population and provide vital demographic and labor force data.

Paying for the Enforcement We Need

The INS itself must receive significantly greater resources if it is to make employer sanctions effective. It will require the full $900 million addition called for in the reform legislation over the next two years, with that higher level of spending sustained in ensuing years. While much of the funds must necessarily come from general revenues, more ways must be found to shift more of the cost to both the beneficiaries of our immigration system and those who abuse it. Significantly higher fees would not be unreasonable for those applying for or receiving asylum immigrant visas, change of status, or family or labor preference petitions. Congress should again consider earlier unsuccessful proposals to levy a fee on users of special replenishment and temporary agricultural workers, thus leveling the cost advantage of foreign workers over domestic ones while building a trust fund for underwriting research and training to help foreign labor users develop permanent domestic labor alternatives. The FRG now recovers enforcement costs by, in certain cases, requiring the convicted employer of illegal aliens to pay the repatriation travel cost of aliens hired — a major cost item in the INS budget.

Employer Sanctions: A Safeguard for the Vulnerable Newcomer

Europeans are more inclined than most Americans to see employer sanctions not just as a means of immigration control, but as a way of protecting vulnerable workers, whether native or foreign, against

Europeans are more inclined than most Americans to see employer sanctions not just as a means of immigration control, but as a way of protecting vulnerable workers, whether native or foreign, against the neglect and deliberate exploitation inherent in illegal alien employment.

the neglect and deliberate exploitation inherent in illegal alien employment. Labor unions were leaders in the fight in Europe for employer sanctions. The German Trade Union Federation (DGB), began to appeal sanctions as early as 1968. In France it was the Socialist Party, with its strong identification with the working class, and with the backing of the unions, that gave priority to toughening the enforcement of employer sanctions after it took power in the early 1980s. Unions in Sweden, Denmark, and Austria are virtual partners of their governments in enforcing sanctions.

It was the United Nation's oldest specialized organization, the International Labor Organization (ILO) where trade union leaders deliberate together with government and employer representatives, that in 1975 passed Resolution 143 giving employer sanctions international acceptance. The ILO saw then the need ". . . to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequence," and to eliminate the abuses of ". . . illicit and clandestine trafficking in labor." Article 6 of the ILO Convention calls for provisions in national laws or regulations ". . . for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil, and penal sanctions."[9]

American labor, the AFL-CIO, also has supported employer sanctions legislation since the early 1970s, leading the drive for enactment of California's prototypical employer sanctions law, the Dixon Arnett Act, in 1971. The AFL-CIO, however, has become less resolute in recent years as some key affiliates in apparel, agriculture, hotel and restaurant, food processing, and services have recruited illegal alien workers. Employer sanctions should be seen as the latest in one hundred years of labor-backed effort to ensure that U. S. immigration laws protect the wage and standards of American workers, beginning with the 1885 law prohibiting the entry of foreign contract labor.

While the new United States law indeed aims at curbing the flow of illegal workers, current legal immigration trends can be counted on to bring larger numbers of the less skilled into our economy for years to come. Herein lies a significant and potentially challenging differ-

The European experience shows that without employer sanctions the task of integrating large numbers of vulnerable, newly legalized residents who have built some equity in our system would be more difficult. Their wages and labor standards, the very worth of their legal status, would be most at risk if employers remained free to hire and exploit illegal aliens.

ence between current U. S. circumstances and those existing in the 1970s when the Europeans adopted employer sanctions. Faced with severe economic slowdowns, the Europeans virtually halted legal immigration. Job growth in Europe at that time was slow and remains so. But the United States has enacted sanctions at a time of fair job growth and with the prospects for burgeoning legal immigration. Estimates range from 100,000 to 750,000 for the number of new workers who will legally enter our labor force under the Special Agricultural Workers legalization arrangements (SAW) of the 1986 Immigration Reform Law. As these new workers tire of their farm job and begin moving into less-skilled urban occupations, they will be replaced with additional legalized foreign workers under the Replenishment Agricultural Workers (RAW) permitted by the law. Thousands more will work seasonally each year under the new law's eased temporary agricultural workers arrangement (H-2A).

Then, amnesty for those proving they entered illegally before 1982 will bring hundreds of thousands more illegal workers out of the shadows, and enable them to seek their full rights and better working conditions. Legal immigration, pulled by the suction pump of family reunification and now surpassing 600,000 a year, will yield rising numbers of less-skilled newcomers.

In making its generous offer of legalization or safehaven, U.S. society undertakes a solemn obligation to give the full protection of its laws to those entitled to be legalized. The European experience shows that without employer sanctions the task of integrating large numbers of vulnerable, newly legalized residents who have built some equity in our system would be more difficult. Their wages and labor standards, the very worth of their legal status, would be most at risk if employers remained free to hire and exploit illegal aliens. Most importantly, employer sanctions can help provide an opportunity for jobs and better wages for the twelve million to fifteen million citizens and legal residents who are now jobless or working part-time because that's the only employment available.

Critics have often pointed out that employer sanctions were not a panacea in Europe. Indeed they are not. But the European countries that have successfully applied them never regarded them as more than one instrument in an array of policies against illegal immigration. Sanctions have yielded best results when coordinated with a range of manpower, law enforcement, and economic policies.

Among possible complementary steps for the United States, better management of our labor force stands out. For general economic and social progress, as well as to reduce reliance on illegal alien workers, we must make full and efficient use of our potential domestic labor force, including displaced workers, willing senior citizens, the handicapped, women, and minorities, as well as the large numbers who will enter it through the legalization and amnesty provisions of the new law.

Reduced demand for illegal immigrants would be only a byproduct of steps the United States might take to improve the proficiency of the domestic labor force and rationalize its use. While this extensive agenda cannot be discussed in detail here, it is clear that we must:

- Improve the labor market service performance of the United States and state employment services, and strive for closer cooperation among INS, the employment services and employers themselves in providing labor market services to legal workers.

- Dovetail our job training and job counseling efforts to meet manpower needs of illegal immigrant-dependent industries.

- Make our present immigration laws more responsive to the country's needs for skills, with less emphasis on reunification of the non-nuclear family and adult children.

The time has also come to consider whether the survival of some industries dependent on foreign labor justifies the high socialized cost

of maintaining them. A few of the most egregious examples can be cited. The carefully protected domestic sugar industry relies on H-2 workers and illegals in south Florida, and mostly illegals in Texas and Louisiana. No one can defend an arrangement that compels U.S. consumers to buy U.S.-produced sugar at prices well above the world price, thus underwriting American sugar producers who employ predominantly foreign labor. At the same time, low-cost producers of sugar in the Caribbean or the Philippines, with their U.S. export quotas now cut to the lowest levels in one hundred years, must lay off workers, who then become candidates for illegal migration to the United States.

Advocates of New York garment producers, which are heavily dependent on illegal alien labor, deplore job losses to imports and lobby Congress against admission of lower cost foreign apparel imports. Domestic clothing manufacturers' spokesmen have even argued that the socially beneficial role their industry plays as an avenue of entry for immigrants itself justifies protection.[10]

Strong protectionist impulses once again are aimed at weakening economic development and job creation schemes in the Caribbean basin that not only can help stabilize the area, but can reduce the pool of potential immigrants. Restrictions on the duty free entry of products from Caribbean Basin Initiative (CBI) countries are in effect a vote for more illegal immigration. Mexico's current best source of new jobs, the In-Bond *(Maquiladora)* industries, which now employ 300,000 Mexican workers, is now under renewed pressures from some U.S. unions and other special interests.

The exceptions for agriculture in the new immigration reform law help perpetuate agriculture's archaic labor policies, invite future immigration abuses, and sap the moral authority of U.S. immigration policies. They should be ended promptly. Western growers have disingenuously but successfully brandished the lobbying appeal of the family farm and low consumer prices to win continuation of the subsidy of foreign labor, thus delaying the mechanization the labor-intensive fruit and vegetable industry needs to meet growing foreign competition. In fact, this labor subsidy goes often not to small or struggling family

Western Europe and the United States have together seen their competitiveness decline in the changing international economy. A significant question for the economic future of both societies is the extent to which the easy availability of cheap, flexible labor has distorted investment decisions, rewarding the overbuilding of low productivity industries and discouraging technological innovation.

farms but to large-scale operations owned by banks, conglomerates, and oil companies. The citrus industry, a major employer of illegals, has corporate and absentee ownership of 80 to 90 percent. Citrus has overexpanded because of tax preferences, competition-limiting marketing orders, and subsidized labor and water. Some ten thousand citrus growers stand as a powerful lobby for protection against low-cost citrus from Latin America.[11]

Employer Sanctions: A Discipline for Economic Competitiveness

Western Europe and the United States have together seen their competitiveness decline in the changing international economy. A significant question for the economic future of both societies is the extent to which the easy availability of cheap, flexible labor has distorted investment decisions, rewarding the overbuilding of low productivity industries and discouraging technological innovation. Faced with the choice between long term commitments to labor saving capital improvements and hiring more inexpensive, disposable labor to increase output, too many European and American employers in hard-pressed industries have opted for labor. But even with the implicit subsidy of cheap foreign labor, some such industries have still needed protection to survive over the longer term.

Employers, both European and American, in such sectors have experienced the same "tread mill" effect from their reliance on foreign labor. The availability of foreign workers lowers employers' incentive to restructure wages and working conditions to attract and hold domestic workers. The widening wage gulf between their firms and more technologically advanced ones then causes domestic workers to abandon their industries, creating further "labor shortages" to be met by the importation of still more foreign workers.[12] Getting off the treadmill will be painful for some, but good for the country.

Screening illegal alien from jobs and replacing them permanently with legal residents will often demand changes in the hiring practices, cost distribution, and production methods of dependent employers. High

among requirements will be greater attention to job content, motivation, training, efficiency, and wages. It must be accepted that some marginal firms may not survive this process, or may find that they must change their service or product. Acceptance of the consequences of effective employer sanctions means acceptance of the possibility of fewer jobs than might have been created in our economy in the long run, but better ones.

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